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**TESTIMONY OF THE OHIO RAIL DEVELOPMENT COMMISSION  
IN THE MATTER OF EX PARTE 582 (SUB-NO. 1)**

May 12, 2000

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***Introduction***

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Public Record

Although Ohio communities, rail users, rail labor, and small railroads have experienced (and continue to experience) adverse impacts far beyond those projected by CSX and Norfolk Southern (NS) and the Surface Transportation Board (STB) in the split up Conrail, the Ohio Rail Development Commission (ORDC) understands that mergers do have benefits. ORDC will continue working with the railroads and the STB to help deliver the benefits of the Conrail sale to Ohio.

ORDC applauds the STB for taking a broad based approach to revising its merger rules in a timely manner following adoption of new policies and procedures as recommended herein. While ORDC urges caution in preventing future mergers from turning out like the Conrail split and Union Pacific - Southern Pacific merger, we recognize that railroads such as Canadian National (CN) and Burlington Northern/Sante Fe (BN/SF) have successfully implemented their mergers without service disruptions. While we firmly believe that Class I railroads should not be able to enter into another merger until they have delivered upon the benefits promised in the preceding merger, we also firmly believe that railroads such as CN and BN/SF should not be punished for the

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past sins of other railroads. ORDC encourages the STB to handle the CN - BN/SF merger application in an expeditious manner.

ORDC Ex Parte comments are grouped into three basic categories:

*1) Competition and Access*

*2) Possible New Procedures/Railroad Accountability*

*3) Increased State Role*

The time is past when the STB can merely attempt to maintain the existing level of competition in a merger process and effectively serve the nations transportation system. The time has come for the STB to make it a tenant of any merger that the involved railroads demonstrate how rail to rail competition will be enhanced by the transaction. Inherent in the concept of enhancing rail competition is the acceptance by the STB that a reduction in railroads in an area from three to two does indeed have an adverse impact on rail competition.

It is also the time for the STB initiate new and simpler practices such as mediation and other alternative dispute resolution techniques, rather than traditional STB regulatory processes which no longer involves participatory hearings. This is especially relevant to small shippers and small communities. For example, ORDC is aware of Ohio rail shippers such as Wyandot Dolomite who have been forced to spend

untold thousands of dollars over the last three years in the STB regulatory process to adjudicate a basic complaint that could have been resolved by arbitration or mediation years ago. We are also aware of small communities such as Fostoria which lacked the resources to carry its fight for a grade separation to the STB appeals process.

The STB also needs to establish new and simpler procedures to better evaluate after the fact the actual merger benefits, as well as adverse impacts on communities, shippers, small railroads, and rail labor in its new merger guidelines. Where predicted benefits are not realized, or where problems in integrating rail systems adversely impact communities, shippers, rail labor, and small railroads, there needs to be streamlined STB procedures to enable adversely impacted parties to seek proper corrections and remunerations. The merging railroads need to be accountable before, during, and after the STB decision making process for the adverse impacts they create.

Ohio has a very clear example of where the current STB practice and procedure fails. Despite the best efforts of the State of Ohio and local Ohio communities to demonstrate to the STB that grade separations would be needed due to the increased train traffic and congestion which would result on certain lines from the Conrail split, the STB did not mandate a single grade separation in Ohio. Ohio taxpayers will spend \$180 million dollars over the next 10 years to build grade separations to alleviate severe problems directly related to the Conrail decision.

A common thread the STB should consider throughout the new rule making is how to more effectively use state government to help in merger processes. They maintain day to day contact with communities, shippers, and small railroads. The state

government has on the ground personnel who can provide a huge amount of expertise on a wide array of subjects such as environmental reviews, assessments of relevant transportation logistics, assessments of community impacts, and other such areas.

In addition, states could be utilized for innovative new approaches to mergers involving arbitration and mediation. The STB may be able to use properly trained state officials as arbitrators and mediators just as the Federal Railroad Administration (FRA) now uses Public Utility officials in many states as FRA certified track and operating practices inspectors.

## **1) COMPETITION AND ACCESS**

The STB clearly will not try to take on the role of a national rail planning agency by drawing the railroad map for the next century. However, while the merger rule making process is going on, the STB does need to do its own investigations into how rail competitive forces work in the real world. More importantly, the STB needs to consider how transportation costs and service accessibility impact American businesses ability to compete in the world market. Ohio agrees that the STB needs to ensure that competition exists, without too much regard on how that impacts particular competitors. But in the most recent merger we have seen, the purchase of Conrail by Norfolk Southern and CSX, it appears the noble macro goal of preserving competition in general, got lost in the morass of the thousands of individual micro issues which the STB had to deal with.

In particular, the STB failed to serve its stated macro vision by summarily rejecting any claim that the reduction of competitors from three to two ( 3 to 2) had absolutely no impact on competition. Ohio disagrees with the STB's past 3 to 2 assumption. It goes against common sense, conventional wisdom, and common practice. The impacts of the loss of a third rail option like Conrail may leave a level playing field for many Ohio businesses competing with other Ohio businesses, but never the less, businesses are negatively impacted. One low value commodity shipper, Wyandot Dolomite did appear before the STB to attempt to prove how badly they would be hurt by a "3 to2" reduction.

Because of restrictive STB rules, however, most shippers and short lines who knew they would be adversely impacted by the reduction in competition from 3 to 2 railroads did NOT go before the STB because the STB clearly stated that "3 to 2" issues would not be considered by the Board. An example of the problem with such a blanket approach is a major integrated steel plant in northern Ohio. It had three Class I railroads serving it before the split up of Conrail. However, only two out of the three railroads, NS and Conrail, had reasonable direct access to the coke supply for the steel plant. Unfortunately for the steel mill, NS acquired the lines Conrail had used to compete for coke traffic so while technically the steel mill was a "3 to 2" issue, in reality it was a "2 to 1" situation.

ORDC believes that the impacts of the 3 to 2 issue go beyond the borders of the United States, or for that matter, North America. While most businesses might be on a relatively even playing field with each other when there are only two giant Class I

railroads left, that does not necessarily mean that they will be on a level playing field with the rest of world. American business must compete in the world economy. Our competitive transportation system is a key asset in this regard. The STB must consider the loss of a competitive edge on a global basis when considering whether 3 to 2 reductions have an impact on rail shippers.

In addition, ORDC believes that the STB should enhance competition by incorporating enhanced access into the process. For example, in the split up of Conrail, the Toledo/Lucas County Port Authority argued that it was losing one of its railroads, Conrail, at the Toledo Port. NS countered that it would replace Conrail at the Port and STB provided no other access. ORDC is still waiting for NS to actively pursue business through the Toledo port. ORDC believes that had the STB allowed the Wheeling & Lake Erie Railway or the Ann Arbor into the Port to make up for the loss of Conrail access, competition would have been enhanced. The Toledo Port would have been more competitive without harming CSX or NS.

Enhancing access to public ports (lake, river, and ocean) for small railroads would be an excellent means by which the new STB merger rules could improve multi-modal competition. ORDC believes that some of the principles established in Ex Parte 575 could be applied in the Ex Parte 582 process. For example, as conditions for approving mergers, STB could mandate that small railroads serving short haul traffic (100 miles or less) be allowed into ports controlled by merging railroads at reasonable costs.

Further, ORDC backs shipper efforts to initiate rules requiring joint line rates in so-called "bottleneck" situations and to obtain reasonable reciprocal switching rates in

terminal areas and wherever else it is feasible. Also, ORDC backs the concept of the American Short Line and Regional Railroad Association's proposed "Bill of Rights". Finally, ORDC supports the maintenance of existing gateways which might otherwise disappear due to a railroad merger.

## **2) POSSIBLE NEW PROCEDURES/RAILROAD ACCOUNTABILITY**

In the Conrail split process, Ohio, like the rest of the impacted states, found itself in a quandary: "Would it be better to negotiate deals with NS or CSX early on, or wait and see what relief could be won at the STB?". There was a certain amount of river boat gambler or "Let's Make a Deal" game show flavor to the situation. On one hand, taking an early "deal" could have meant a lucrative payoff to Ohio in some terms, say new facilities or investments, but in other ways, it could have been very dangerous because Ohio might have been on the sidelines for issues which did not surface until later in the process. Ohio chose to make deals early on some issues such as crossing safety improvements, chose to participate in last minute negotiations on other issues such as the Cleveland settlement, and participated actively in STB proceedings on yet other issues such as reparations for negative impacts on the Wheeling & Lake Erie Railway and for grade separation relief.

While the process the STB used for the Conrail proceeding certainly was interesting, it did not have to be so problematic and did not have to have so much of a casino like atmosphere. Ohio relied on a bevy of highly paid economic experts, STB attorneys, and consultants to augment our political savvy for making decisions as to when

to settle and when to press on for STB relief. To some extent, we needed this high priced help because we had no alternative. While not all Ohio issues could have been mediated, ORDC believes that many of them could have been had there been a readily accessible mediation process sponsored by the STB.

The guidance of an STB mediator could be especially useful for less controversial issues. ORDC envisions a voluntary process by which Administrative Law Judges or STB mediators clearly relate how precedents apply to current situations and how the new rules work to both parties. The presence of an unbiased mediator would tend to keep order, dispel uninformed beliefs about what relief may be available through the STB, and encourage both sides to take reasonable positions in the hope of reaching a solution without costly litigation.

ORDC believes that small communities, small railroads, and small shippers would most benefit from STB mediation or alternative dispute resolution. We believe the current merger rules all but eliminate these small entities from the process because they lack the financial wherewithal to take on the railroads, or to participate effectively before the STB.

In addition to mediation, ORDC believes that the STB should consider providing arbitrators for some disputes. Unlike mediation, and other alternative dispute resolution techniques, which ORDC believes should be non-binding, ORDC believes arbitration should be binding. Further, we believe that the states, communities, shippers, short lines, and rail labor should have the choice as to whether to arbitrate or not, but that the merging railroads should not be able to force these other parties into binding arbitration.



It is the merging railroads which create the issues which would be arbitrated. It would be unfair to allow them to force other entities into any specific course of action, especially arbitration, to resolve them. Further, some entities, especially state and local governments, have legal and policy restrictions concerning arbitration. An arbitration system is especially applicable and useful in situations involving the finding of fact.

Over two years ago, in Ex Parte 560, the STB adopted rules providing for the resolution of certain factual disputes through voluntary arbitration. The underlying basis for the rules was to provide a more accessible and relatively inexpensive process to achieve prompt decisions not otherwise available under existing STB procedures. The Rail Shipper Advisory Council proposed a number of experienced transportation attorneys and economists to serve as arbitrators. However, the STB has yet to publish a roster of approved arbitrators and the arbitration procedures are unused.

ORDC believes that the STB should consider following through on the Ex Parte 560 rules by publishing the roster of STB arbitrators. Further, STB should consider expanding this concept to include STB mediation or alternative dispute resolution procedures for the new merger rules. Again, ORDC stresses that state and local officials, shippers, short lines, and rail labor should have the option of entering arbitration, or alternative dispute resolution procedures, while it should be mandatory for railroads seeking to merge to do so.

Whether mediation, other alternative dispute resolution, or arbitration is pursued, ORDC believes that it is important that the official involved be an STB representative, well versed in transportation and the STB merger process. In this way,

the services provided will be perceived by all parties as being very reflective of what the STB board members would do if the issue was fully litigated.

ORDC supports the increased accountability of railroads in the merger process in three areas.

First, ORDC believes that the STB should create a process through which it officially assesses whether the benefits promised by railroads in a merger actually occur. The merging railroad should not be allowed to participate in any other merger proceeding until such time as the STB officially declares that the projected benefits of the last merger have been achieved. ORDC has particular concerns about rail rates going up rather than down as the result of a merger. Railroads seeking to merge should be required to demonstrate where rate reductions will occur before the merger is allowed, and should be required to demonstrate that they have met their projections within a five year timeframe, the timeframe STB has already established for merger oversight.

Second, ORDC believes that the STB should create alternate dispute resolution procedures as described above to allow communities, shippers, and short line and regional railroads, to be compensated for losses caused by the inability of the railroads involved to provide effective service after a merger is implemented. Ohio's experience with the Conrail split up has been that shippers have been forced to use higher priced transportation options, short lines have lost business and experienced costly delays, and the state and communities are being forced to absorb the costs of grade separations to the tune of \$180 million, because CSX and NS have not yet resolved all the service

problems in integrating Conrail into their respective systems. Under the current merger rules, it is very doubtful that NS or CSX will provide remunerations to those harmed.

Third, ORDC urges the STB to carefully evaluate the impacts of a proposed merger on rail labor before and after it takes place. ORDC posits that a merging railroad's ability to deliver the benefits it promises in a merger are directly related to how the merged railroad treats rail labor. ORDC backs rail labor in its efforts to prevent so-called "cram downs" on rail labor, i.e. the forcing the rules of one merging railroad union onto union of another merging railroad .

### **3) INCREASED STATE ROLE**

Ohio and many other states have demonstrated their willingness to take on the expense and burden of analyzing proposed mergers. ORDC believes that the STB should look to the states to augment STB resources. There is a good chance that STB will never receive the funding it needs to provide new services such as mediation and other alternative dispute resolution procedures. Forward looking states might be willing to spend funds that they would otherwise use in expensive litigation, to pay for part of the costs of mediators or arbitrators selected and trained by the STB. Such state adjuncts to the STB system could be used for more than merely merger issues. They could prove invaluable for ongoing issues between railroads and shippers, short lines, and governments.

In addition, states could play a larger role in environmental issues. Based on recent experience, Ohio can provide first hand advice as to environmental and safety

priorities and as to whether proposed mitigation will be adequate to achieve needed results. As with mediators and arbitrators described above, the STB may be able to train and use State officials in the environmental area rather than spending untold STB funds on consultants who may not be as well versed in local issues as State officials. As we stated in our February 29 testimony, ORDC is very much aware of the shortfalls of STB mandated mitigation in the Conrail sale issue.

Further, Ohio will soon offer what may be the best example of how to prioritize grade separation projects. Through Ohio's new \$200 million grade separation program (\$120 million Ohio Department of Transportation, \$10 million new state funds, \$20 million existing state and federal funds, \$10 million local funds, \$20 million in ORDC funds and other matching funds), we will soon develop a prioritization process that uses the best available techniques to measure as objectively as possible when and where grade separations are most warranted.

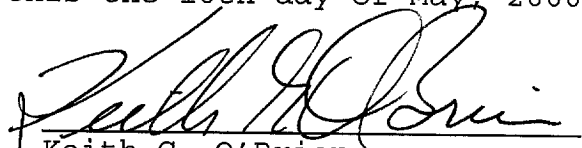
### *Conclusion*

ORDC applauds the STB for recognizing that the time has come to revamp its merger procedures. ORDC looks forward to participating throughout the process.

ORDC urges the STB to use the new rules to enhance America's transportation competition so that American industry can better compete in the world market. At the same time, we urge the STB to work with the states to improve the accountability of the railroads for actions they take in their own self interest.

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the forgoing on behalf of Ohio Rail Development Commission, on all known parties of record on the Service List on this the 16th day of May, 2000.

  
Keith G. O'Brien